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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 565

FRANK L. DITTMEIER,
Petitioner,

vs.

MISSOURI REAL ESTATE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

MALCOLM I. FRANK,
HARVEY M. FISHER,
SAMUEL RABAN,
418 Olive Street,
St. Louis 2, Missouri,
Attorneys for Petitioner.

Of Counsel:
JOSEPH NESSENFELD.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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Your petitioner, Frank L. Dittmeier, respectfully prays for a Writ of Certiorari to the Supreme Court of Missouri to review a judgment entered in Cause No. 45,847, the above-entitled case, on the 14th day of July, 1958; rehearing denied on the 8th day of September, 1958.

OPINIONS BELOW.

The initial judgment or decree was an Order by the Missouri Real Estate Commission inflicting a penalty of six months suspension of petitioner's license as a real

estate broker. This is hereinafter referred to as Order No. 1 and is found in the Appendix, page No. 25.

Order No. 1 was, on petition for review, set aside and quashed by the Honorable James F. Nangle, Judge of the Circuit Court of the City of St. Louis, Division Three, and is found in the Appendix, page No. 32.

Judge Nangle's decision was appealed by the Missouri Real Estate Commission to the St. Louis Court of Appeals which rendered its decision and opinion reinstating one of the many charges quashed by Judge Nangle and remanded the case to the Missouri Real Estate Commission in an opinion issued as modified on denial of rehearing on the 26th day of March, 1951, cited as **Dittmeier v. Missouri Real Estate Commission**, 237 S. W. 2d 201, and found in the Appendix, page No. 33.

The second Finding and Order of the Missouri Real Estate Commission, upon remand from the St. Louis Court of Appeals, is the crux of this petition. It is in the form of an undated document, received by the petitioner on the 28th day of June, showing by a stamp that it had been received by the Missouri Real Estate Commission from some other source on the 1st day of June, 1951. This Order again inflicted the same penalty against petitioner, a suspension of his real estate broker's license for a period of six months. This Order is found in the Appendix, page No. 47.

Order No. 2, of June, 1951, was, on petition of review, upheld by the Honorable Ivan Lee Holt, Judge of the Circuit Court of St. Louis, Division Three, in an opinion and judgment rendered on the 23rd day of July, 1956, when petitioner's Motion for New Trial and Rehearing was denied (T. 54). This judgment of the Circuit Court is found in the Appendix, page No. 52.

On timely appeal, the cause was first assigned to Division Two of the Supreme Court of Missouri, but was on

the Court's own motion transferred to the Court en banc, who on the 14th day of July, 1958, entered a judgment, and on the 8th day of September, 1958, denied petitioner's Motion for a Rehearing. The opinion is cited as **Dittmeier v. Missouri Real Estate Commission**, 316 S. W. 2d 1, and is found in the Appendix, page No. 53.

QUESTIONS PRESENTED.

The questions here presented arise out of the actions of the Missouri Real Estate Commission subsequent to a mandate of remand from the St. Louis Court of Appeals.

The Court of Appeals determined that one of many charges of violations by petitioner was substantiated by evidence. It remanded the case to the Circuit Court with directions to the Commission to set aside its other findings of violations, together with the penalty of a six months suspension of petitioner's license; "and for the assessment of whatever penalty in its discretion the Commission may deem proper under the circumstances for the violation of Section 10g of said Act." The meaning, scope and effect of this order of remand are directly involved in the questions presented here.

Also involved in the questions here presented is the meaning and effect of the Missouri Statute relating to all administrative agencies (Sec. 536.080, R. S. Mo. 1949, set out on page 6), which provides that when all of the officials of the agency who are to render the final decision do not hear or read the evidence, the decision shall not be rendered until an opportunity is afforded the parties to present their arguments to all of the officials who are to render the decision. This section is important for the reason that one of the members of the Commission was replaced between the time the petitioner appeared at a hearing and the remand by the Court of Appeals.

The following facts are pertinent:

1. There was a full hearing before the Commission in 1946.

2. Mr. Frank Woodward was not a member of the Commission at that time.

3. After the mandate of the Court of Appeals was filed on June 2, 1951, no notice was given to petitioner of action contemplated by the Commission, and no opportunity was afforded him to appear before any of the Commissioners to present arguments regarding the assessment of a penalty or of the circumstances then prevailing.

The Commission delivered to the petitioner on the 28th of June a document, received by the Commission on the 1st day of June, 1951, which document repeated only the findings of fact sustained by the Court of Appeals and again imposed the penalty of suspension of petitioner's license for six months. This was signed by all the Commissioners, including Mr. Frank Woodward, who joined the Commission long after the hearing.

Nowhere in the record or elsewhere does it appear affirmatively that Mr. Woodward ever read the record or any evidence. It is obvious that he heard no evidence or arguments from petitioner.

One of the questions presented is whether the failure to afford petitioner an opportunity to present arguments to or to be heard by all the Commissioners, including Mr. Frank Woodward, is a denial of due process of law under the circumstances.

Another of the questions presented is whether there was an abuse of discretion and an arbitrary act by the Commission to have already prepared on the 1st day of June, 1951, findings of fact, conclusions of law and a penalty order imposing the same penalty as before, when the man-

date of the Court of Appeals was not filed in the Circuit Court until the next day, the 2nd day of June, 1951.

Another question presented is whether the denial of an opportunity for the petitioner to present either argument or evidence as to the circumstances prevailing in 1951, after the remand by the Court of Appeals, in contrast to those prevailing in 1946, was an abuse of discretion and a denial of due process.

Another question is whether it is proper to presume *a priori* that Mr. Woodward read the record of over 400 pages before he signed the document prepared prior to date on which the mandate of the Court of Appeals was filed.

JURISDICTION.

The judgment of the Supreme Court of Missouri was entered on the 8th day of September, 1958, when the Court denied petitioner's Motion for Rehearing (T. 83). The Court sustained petitioner's Motion to stay its mandate on the 17th day of September, 1958, and the judgment order was stayed to December 8, 1958 (T. 83), to permit petitioner to apply for a Writ of Certiorari to the Supreme Court of the United States. The Supreme Court of Missouri had transferred the case from a division to Court en banc and found that it had jurisdiction because of the issue of due process under the Constitution of the United States (T. 71).

The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1257 (3).

The Court has heretofore granted certiorari in cases involving arbitrary and abusive practices of administrative agencies as denial of due process where it touched a person's profession and means of livelihood or without a full hearing or notice.

STATUTES INVOLVED.

The portions of the Statutes of the State of Missouri relating to real estate brokers here relevant are Section 339.080, Paragraph 1, as follows:

(Laws 1941, p. 424, Sec. 11—Chapter 339, R. S. Mo. 1949) 339.080—Denial of Application, When.

1. The Commission may deny an application for a license, or suspend or revoke a license issued, only after a hearing, of which the applicant or licensee affected shall be given at least ten days' written notice . . .

The Statute of the State of Missouri relating to administrative procedure and review here relevant is in Chapter 536, R. S. Mo. 1949, specifically Section 536.080, which provides:

Evidence to be heard by all officials—exception—whenever in a contested case, all of the officials of the agency who are to render the final decision do not hear or read the evidence, such decision shall not be rendered by the agency until each party to the proceedings has been afforded an opportunity to present arguments, either oral or written, to all of the officials who are to render the decision. All of the officials who are to render the decision shall, before deciding the case, personally consider the whole record or such portions thereof as may be cited by the parties and shall personally consider any oral or written arguments presented by either of the interested parties. The parties may, by written stipulation, waive compliance with this Section (Laws 1945, p. 1504, Sec. 8).

CONSTITUTIONAL PROVISIONS INVOLVED.

The Fourteenth Amendment:

". . . . No state shall make or endorse any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF MATERIAL FACTS.

Frank L. Dittmeier is and was a real estate broker in the City of St. Louis, licensed by the respondent Missouri Real Estate Commission. On November 8, 1946, petitioner received a notice of a hearing to be held November 21, 1946, concerning certain charges made against him to the respondent. The notice contained four counts (the last of which was abandoned). Each of the first three counts set forth a number of charges arising out of three separate real estate transactions, and involved matters which allegedly occurred and took place in 1945 and 1946.

Testimony was taken November 21 and 22, 1946, and the Commission thereupon took the matter under advisement. On January 23, 1947, the Commission made a number of findings of fact and conclusions of law finding petitioner guilty of a number of charges and innocent of others and ordered the license of petitioner as a real estate broker suspended for a period of six months (Appendix A).

Upon petitioner's petition for a review of this order, the Circuit Court of the City of St. Louis quashed and vacated the Commission's finding, decision and order (Appendix B). The Commission appealed from this judgment to the St. Louis Court of Appeals. That Court held that none

of the Commission's findings of guilt of the charges contained in Counts 1 and 3 were supported by the evidence; but that as to a single finding of guilt based on Count 2, there was sufficient competent evidence upon which the Commission could reasonably find that petitioner violated Section 10g of the Missouri Real Estate Commission Act [now Section 339.100 (7), R. S. Mo. 1949]. The opinion of the Court of Appeals is reported in 237 S. W. 2d 201 (Appendix C).

The Court of Appeals set aside, as not supported by evidence, all findings of trickery, false representation, artifice and deceit involved in the Maguire Count 2 and sustained only the single finding (11) "that the licensee Frank L. Dittmeier had already sold or entered into a contract of sale covering the real estate in question, with one Leonard J. Brady at the time the licensee secured the signature of said Virginia M. Maguire to said warranty deed * * * and that at and prior to such time the licensee had been employed by the said Virginia M. Maguire as agent to sell such property for her." The Court of Appeals ruled that this finding (that petitioner "had already sold or contracted to sell the property to Brady at the time he procured the deed from Mrs. Maguire") was alone sufficient to justify the finding of a violation of Section 10g of the Act.

The Court of Appeals ordered the case remanded to the Commission with directions to set aside certain of its findings together with the assessment of the six month suspension "and for the assessment of whatever penalty in its discretion the Commission may deem proper under the circumstances for the violation of Section 10g of said Act."

The mandate of the Court of Appeals was filed in the Circuit Court on June 2, 1951. On June 28, 1951, petitioner received, by mail, a new finding, decision and order of the

Commission which recited that it was made "pursuant to the opinion of the St. Louis Court of Appeals." (The order bears a commission stamp on its face stating that it was received by the Commission on June 1, 1951.) This order, which is undated, contains the findings which were sustained by the Court of Appeals as being supported by evidence, and then ordered petitioner's license as a real estate broker suspended for a period of six months commencing July 1, 1951. Between the making of the two orders against petitioner, one of the members of the Commission, Vincent J. O'Flaherty, was replaced by Mr. Frank Woodward. Mr. Woodward's signature appears on the new order (Appendix D).

It is conceded by the Commission that no hearing of any kind was held with respect to the finding, decision and order, and that no notice whatever was given petitioner or his counsel of the Commission's intention to take action pursuant to the mandate of the St. Louis Court of Appeals, and that the finding, decision and order were made without any notice to petitioner and without affording him any opportunity whatever to be heard with respect thereto (T. 44).

Petitioner then filed a petition for review in the St. Louis Circuit Court on June 30, 1951 (T. 1), and obtained a stay of the enforcement of the order of suspension (T. 20).

The petition for review filed in the St. Louis Circuit Court (T. 1-11) contains a number of grounds for reversal of the order. The petition charges, inter alia, that the failure of the Commission to give notice to petitioner and an opportunity to be heard before assessing the penalty and entering its order was arbitrary, constituted an abuse of discretion, and denied petitioner due process of law in contravention of the Fourteenth Amendment

to the Constitution of the United States; that no hearing was held with respect to said finding and order and that it was arbitrarily entered; that the suspension order was in excess of the jurisdiction of the Commission, and that the Commission followed no lawful procedure in making the same; that Section 10 (g) of the Act [Section 339.100 (7)] is vague, indefinite, sets up no ascertainable standards of conduct, and leaves the determination of proper conduct to the caprice and whim of the Commission, in contravention of the due process of law requirements of the United States and Missouri Constitutions, and that the suspension of petitioner's license on the vague and uncertain ground permitted by said section deprives petitioner of his livelihood in violation of said due process requirements; and that the finding of fact does not support the conclusions of law or the order of suspension based thereon (T. 4-6).

The Circuit Court of St. Louis, in due course, issued its judgment and order affirming and sustaining the Commission (T. 54) Appendix E, whereupon petitioner filed a timely appeal to the Supreme Court of Missouri (T. 55). This appeal was transferred on the Court's own motion to the Court en banc, acknowledging that the issue of due process under the Fourteenth Amendment was properly raised and preserved for review (T. 66).

The Supreme Court of Missouri, in due course, issued its opinion and decision (cited as Mo. Sup., 316 S. W. 2d 1) Appendix F.

Petitioner's motion for rehearing was timely filed on the 26th day of July, 1958 (T. 77-82) and was overruled on the 8th day of September, 1958.

It is an important and material fact that the personnel of the Commission had changed from the time of the first hearing to the time of the issuance of the order.

It is also significant that nowhere is there any statement that the Statute relating to administrative and quasi-judicial agencies was complied with. Nowhere in the entire record and throughout all the proceedings is there an affirmative statement that Commissioner Woodward ever read, considered, or heard any evidence or argument. It is a fact that this void appears in this case.

JURISDICTIONAL QUESTIONS PROPERLY RAISED.

The issue of due process under the Fourteenth Amendment and the questions of arbitrary and abusive determination by an administrative agency, were timely raised and put in issue at the time the petitioner filed his application to the Circuit Court of the City of St. Louis, to review the Order and Decision of the Missouri Real Estate Commission (T. 4, 5, 7), and at the trial in the Circuit Court (T. 43).

Petitioner continued to timely preserve these issues in his Appeal to the Supreme Court of Missouri (T. 60).

The opinion of the Supreme Court of Missouri recognized these issues in the case (T. 68).

Petitioner filed a timely motion for rehearing (T. 77-82), which was overruled by the Supreme Court of Missouri (T. 83).

Petitioner filed a timely motion to stay issuance of Mandate and Enforcement of Judgment (T. 84), which was sustained by the Supreme Court of Missouri on the 17th day of September, 1958 (T. 83).

Wherefore, the jurisdictional questions have been timely and properly raised and preserved for review by this Court.

REASONS FOR GRANTING THE WRIT.

The Supreme Court of Missouri held, in effect, that the change in personnel of the Commission was of no material concern. The Court wholly failed to take note of the fact that petitioner at no time had an opportunity to present an argument or his views to the Commission as constituted at the time of the final order.

The due process clause of the Fourteenth Amendment has been construed by this Court to guarantee the right to present argument as well as evidence on the issue for decision to those who are to decide the case.

Morgan v. United States, 304 U. S. 1, 58 S. Ct. 773;
Shields v. Utah Idaho Cent. R. Co., 305 U. S. 177, 59 S. Ct. 160.

This case squarely frames the issue as to whether quasi judicial agencies, whose personnel has changed between the time a hearing and argument is held, may make a decision depriving a person of property rights without notice of their intention to rule and without affirmatively showing that the evidence and argument are being considered.

The fact that no notice was given to petitioner is a matter highly material in the issue at bar. If petitioner had been given notice that the newly constituted Commission was to hand down a decision based on the circumstances, as directed by the mandate of the Court of Appeals, he could have presented the change in circumstances, but he had no notice.

The mandate from the Court of Appeals instructed the Commission to use its discretion in assessing a penalty for the violation of one item where the charge contained many. This cannot mean to merely rubber stamp what had been

done by a differently constituted Commission 5 years before, on three counts containing many more charges. It does not mean that the Commission did not have the right after the exercise of true discretion to arrive at a similar penalty, but the circumstances of the manner in which the order was issued bespeak a clear abuse of discretion and brazen arbitrary action by an administrative agency. Arbitrary actions and abuse of discretion have been held to be a denial of due process.

Konigsberg v. The State Bar of California, 353 U. S. 254, 77 S. Ct. 722;

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123, 71 S. Ct. 624, 95 L. Ed. 817.

How can it be otherwise than arbitrary for a quasi-judicial agency to enter an order without reasonable notice and hearing or an opportunity to be heard by the party whose property rights and professional life and livelihood are affected? How can it be reasonably said that in this case the Commission was exercising its discretion properly "under the circumstances" as instructed by the mandate, if petitioner, the party whose rights were affected, not only had no notice that the Commission was taking action under the directions of the mandate but was afforded no opportunity to appear before the Commissioners to present his views of "the circumstances" and current facts which were relevant and proper for consideration in determining what discretionary ruling should be made in the light of the Appellate Court's decision and instructions.

The petitioner had no opportunity of allocution to call to the attention of the Commission, as it was then constituted, that it had no right to make a decision until all of them had either heard or read the evidence. Petitioner does not contend that there should have been a full rehearing. His position is simply that a hearing was required, especially as to the new Commissioner, in the interest of

fairness and justice, so that he could present his views to the Commission, as then constituted, as to whether any penalty, or what penalty should be assessed "under the circumstances."

Under the Statute requirements, relevant in this instance (Sec. 536.080, R. S. Mo. 1949) set out on page 6, it will readily be seen that the first sentence provides for times when the personnel of an agency may change, to the effect that when all of the officials of the agency who are to render the decision do not hear or read the evidence, the decision shall not be rendered until an opportunity is afforded the parties to present **arguments to all** of the officials who are to render the decision. Mr. Frank Woodward, who joined in the final decision, never heard any argument from petitioner and never heard any evidence because he was not a member of the Commission in 1946 when the hearing and argument took place. Mr. Woodward replaced Mr. Vincent J. O'Flaherty. The State Supreme Court would construe the Statute to mean that if Commissioner Woodward did, in fact, read the evidence (there is no showing that he did) taken in 1946, then no right was afforded under the Statute to petitioner to present his argument to the Commission.

In other words, under the State Court opinion, **opportunity for argument is required by the statute only if the Commissioners who join in the decision neither hear nor read the evidence!** Appellant respectfully submits that it does not comport with justice or reason to construe the statute to permit an administrative agency to render a decision on the basis of argument alone, without actual knowledge of the evidence. Yet, in effect, the opinion holds that the agency has a choice. It may either read the evidence or hear the argument and that the one excludes the right to the other. As thus construed, Section 536.080 would be unconstitutional.

Due process of law requires that he who renders the decision have personal knowledge of the evidence of record and that the parties affected be permitted to present argument. The right to a "hearing" implies the requirement of certain procedural minima to insure an informed judgment by those who have the responsibility of the final decision. Yet the State Court opinion holds that one of the two may be dispensed with. That is, if the evidence is read, there is no right to present argument, and if arguments are allowed to be made, then there is no requirement that the evidence be heard or read. On the other hand, if it be said that the Commissioners must hear or read the evidence in all instances in order to render a proper judgment, then under the Court's construction of the statute, there would **never** be a right to present argument under the Missouri statute. This construction of the statute would render the second sentence meaningless and the statute unconstitutional.

The reasonable construction of the statute when considered as a whole is that the right to present argument is guaranteed to the parties in all instances unless they have, by written stipulation, waived that right. In addition, the entire record, or such portion thereof as the parties desire the court to consider, shall be read and considered by all of the Commissioners who join in the decision.

Under the pertinent decisions of the United States Supreme Court construing the word "hearing" in an administrative proceeding, it would be a violation of procedural due process of law to fail to provide for argument as well as for the right to present evidence. In **Morgan v. United States**, 298 U. S. 468, the Supreme Court held as follows:

"The 'hearing' is the hearing of evidence **and argument.**"

It was further said in that case:

> "Argument may be oral or written. The requirements are not technical. But there must be a hearing in a substantial sense."

And in **Shields v. Utah Idaho Cent. R. Co.**, 305 U. S. 177, the Court said:

> "The Commission is to **'determine'**. The Commission must 'determine' **after hearing.** (Court's emphasis.) The requirement of a 'hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. **The 'hearing' is the 'hearing of evidence and argument.'** Morgan v. United States, 298 U. S. 468, 480, 56 S. Ct. 906, 911, 80 L. Ed. 1288. And the manifest purpose in requiring a hearing is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist."

And in the second Morgan case, **Morgan v. United States**, 304 U. S. 1, it was held:

> "The requirements of fairness are not exhausted in the taking or consideration of evidence, but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps."

There can be no question but that administrative due process of law, as construed by the United States Supreme Court, requires a hearing in a substantial common-law sense. That is, it includes the hearing of evidence as well as argument. A hearing has not been given if those who determine the facts have not considered both the evidence and arguments, and the latter statement presupposes that an opportunity to argue the case has been afforded the parties.

Whether the instant case presents a case in which the argument must be oral rather than written is not before the Court. This for the obvious reason that neither oral nor written argument was permitted. It is submitted, however, that the instant circumstances require oral argument. In **Federal Communications Commission v. WJR, The Goodwill Station**, 337 U. S. 265, the Supreme Court had for consideration the question of whether oral argument was necessarily a part of procedural due process of law in all instances. The conclusion it reached was that in some situations such argument is essential to a fair hearing, citing **Londoner v. Denver**, 210 U. S. 373, while in other situations, the argument may be submitted in writing and still satisfy the requirements of due process of law. The Court said that it is a matter for case to case determination of the circumstances when procedural due process requires oral argument. But that opportunity for argument, either oral or written, is a necessary part of procedural due process of law was not a matter of doubt at all.

Petitioner respectfully submits that Section 536.080, R. S. Mo. 1949, construed as a whole and in the light of the constitutional requirements pertaining to procedural due process of law, makes it mandatory that the parties be afforded an opportunity to present argument to all of the Commissioners who join in rendering the final decision. Admittedly, none of the Commissioners personally considered any arguments presented by petitioner for the simple reason that admittedly he had no opportunity to present the same. Under the admissions of record, the provisions of Section 536.080 were violated. The record of this case affirmatively discloses lack of compliance with the procedural and jurisdictional requirements of the statute. The decision was, therefore, made upon unlawful procedure and should be reviewed by this Court on a writ of certiorari.

The statute requires each member of the Commission to either hear or read the evidence. Due process of law requires the same. Commissioner Woodward, who was not a member of the Commission when the 1947 order was rendered, did not hear the evidence. The "complete" record of the Commission, as certified by its secretary and filed in court, does not disclose that Commissioner Woodward read the evidence in the case. The State Court opinion ruled that since no opportunity was afforded petitioner to present arguments to the Commissioners, it would, therefore, be presumed that Mr. Woodward read the evidence and personally considered the same. Petitioner respectfully submits that no such presumption should be indulged in.

The record of the agency should affirmatively disclose that the necessary statutory procedural steps have been followed, and absent such showing in the "complete" record, there should be no room for presumption. The order of January 23, 1947, expressly and properly stated that all of the Commissioners had read and considered the transcript of the proceedings (Appendix A). The final decision and order is significantly and completely **silent** on that matter, and simply states that the order was made "pursuant to the opinion of the St. Louis Court of Appeals." It may be noted that although the mandate of the Court of Appeals was not filed until June 2, 1951 (R. 22), the final order bears on its face a stamp indicating that the document was received by the Commission on June 1, 1951, which would indicate that someone had prepared the document in advance of the receipt of the mandate and mailed it to the Commission for signature as a routine matter.

Only Commissioner Woodward would know the fact as to whether or not he read the evidence. How, then, under ordinary circumstances could petitioner have sufficient information to enable him to file a petition for review in the

Circuit Court charging that Commissioner Woodward had not read the evidence, a procedure which would amount to no more than a fishing expedition? Petitioner submits that it is not only "proper and best for state agencies to affirmatively disclose that statutory procedural steps have been followed," but that this should be held to be mandatory. The Court should indulge in no presumption that Commissioner Woodward read and considered the evidence, absent a showing thereof in the record. In that case, it could be presumed that the record spoke the truth.

The Commission's failure to permit and consider argument before making its final decision is in and of itself a violation of the statutory procedural requirements. The absence of any record that Commissioner Woodward personally read and considered the evidence is an additional violation. Either or both constitutes unlawful procedure and impels issuance of a writ of certiorari here prayed.

Section 339.080, R. S. Mo. 1949, provides that the Commission may suspend a license "only after a hearing." In the instant proceeding for review, the Commission filed both an answer and the "record" before the Commission (T. 24-33). Section 536.140, R. S. Mo. 1949, requires the Circuit Court to hear the case "upon the petition and record filed as aforesaid." The answer of the Commission (T. 21) admits that no notice was given and that no hearing was held with respect to the final decision and order which is involved in this proceeding. Petitioner submits, therefore, that the order was issued in violation of Section 339.080 in that the license was suspended without the required hearing. Much of what is said above in connection with the question of due process is equally applicable on this point. Petitioner respectfully submits that the statute requires a hearing and an opportunity to be heard before a license may be suspended and that the failure to afford the same constitutes arbitrary action.

To the extent that the mandate of the Court of Appeals may be likened to that issued in the ordinary law suit, petitioner submits that what occurred is that a new trial was ordered as to the issue of penalty. Frequently a Court, instead of remanding a case for trial, generally will affirm a judgment as to the issue of liability but reverse and remand it as to the issue of damages. The instant situation is quite similar. The issue of liability may have been determined when the Court of Appeals sustained the finding of fact and the conclusion of law based thereon that such conduct constitutes a violation of the Act. That left the case open with respect to the issue of penalty (or damages).

It could not reasonably be argued that if an appellate court remands a case for the determination of the issue of damages that the parties are not entitled to notice of hearing upon such issue and an opportunity to be heard with respect thereto. Nor in such situation are the parties limited to the evidence on the issue of damages as such evidence existed at the time of the original trial. So, too, in the instant case on the remand for determination of a proper penalty, if any, petitioner was entitled under the express provisions of the statute to notice of a hearing with respect thereto, both as to the propriety of assessing any penalty and as to the extent and nature thereof. Were it otherwise, the Commission would not be exercising the discretion vested in it by law, nor could it properly or rightly be aware of all of the existing circumstances on the basis of which its final ruling should be made.

The lower opinions held that the statute does not require a "second" hearing, and that the Court of Appeals did not affirmatively direct a second hearing. What the Court overlooked is that there never was, in fact, a hearing, in the true sense, on the issue which is involved on the remand. The "hearing" required by the statute neces-

sitates an opportunity to the parties to present arguments to the members of the Commission who decide the issue and who must do so solely on the basis of the facts relevant to that issue, to the exclusion of all the other evidence in the record which does not pertain thereto. **Petitioner never had that opportunity.** Commissioner Woodward had no personal knowledge of the case, and, absent argument, there existed no safeguard at all to prevent either him or the other commissioners from considering extraneous evidence in assessing a penalty on the one finding remaining before the Commission.

The lower court opinions hold that the appointment of a new member of the Commission has no effect at all upon the consideration and determination of matters then pending before the Commission. But the Commission does not exist separate and apart from its members. The statute (Section 536.080) recognizes this to be the fact by its requirement that **all** of the members of the agency who join in the decision give due consideration both to the evidence and the arguments of the parties. It is a misnomer to speak of a "second" hearing when the party never had a first hearing before one or more of the members of the Commission or other agency who finally decide the case. If **all** of the members comprising the Commission as of the time of the final decision have not given the party a full and adequate hearing (including argument) then it follows that the **Commission** did not give him such a hearing. Under these circumstances, in view of the changed membership of the Commission, petitioner could not and did not have in November, 1946, the full hearing to which he was entitled under the statute.

The Court of Appeals directed the Commission to assess "**whatever** penalty **in its discretion** the Commission may **deem proper under the circumstances,**" which means that there must be a determination both as to whether

any penalty should be assessed and if so, as to what that penalty should be in the light of the Court's decision and the then existing circumstances.

In the first instance, in 1947, the Commission had for consideration the totality of the findings of guilt of all of the charges and the extent of punishment by reason of such totality. In making the 1947 order the Commission did not and could not have had for consideration the issue of punishment on the basis of Finding 11 alone. It did not and could not exclude from consideration all of the other evidence in the case and all of the other findings of guilt. It is true that the Commission did state in a conclusion of law that a proper penalty for "each" of the acts of which petitioner was found guilty is a suspension of his license for six months. But it is obvious that the Court of Appeals believed that the word "each" was an inadvertence and that it was used with the meaning of "all." It would not otherwise have remanded the case. In any event, it is apparent that the Commission believed that Findings of Fact 9, 10 and 11 together constituted but one offense and one "act" and assessed the penalty on that basis.

The Court of Appeals struck out Findings 9 and 10, but held that Finding 11 was sufficient, alone and of itself, to warrant a penalty if the Commission so determined. Hence, even though the issue of "a penalty" was for reconsideration, there could be no reconsideration of what penalty should be assessed on the basis of Finding 11 alone, for the simple reason that there never was a consideration in the first instance of that issue, to the exclusion of all other evidence and findings of fact. Petitioner respectfully submits that, in simple justice, he should have been afforded an opportunity to appear and present his views and arguments with respect to an issue on which he had no previous opportunity (and certainly no adequate opportunity) to make such presentation.

Only by a consideration, in which petitioner is given an opportunity to be heard fully and fairly by the Commission and to present all relevant facts and factors which bear upon the propriety of the assessment of a penalty and the extent thereof, may it rightly be said that the Commission has complied with the requirement of the mandate of the St. Louis Court of Appeals and the terms of the statute requiring "a hearing" before a license may be suspended. The failure of the Commission to comply with the procedural requirements of the statute and the mandate of the Court clearly constituted an abuse of discretion and was arbitrary and capricious.

CONCLUSION.

Petitioner respectfully submits that the requirements of due process of law and of the applicable statutory law make it mandatory that the Commission give notice to any person whose rights are to be affected by any action taken in the exercise of its discretion, and that every party is entitled to an opportunity to be heard and present argument with respect to the proper decision to be rendered in any case.

In the instant case petitioner concededly was given no notice and no opportunity to be heard. Admittedly, no hearing at all was held in connection with the final order, which was evidently entered mechanically and arbitrarily. Admittedly, he was afforded no opportunity for argument. The Commission not only abused its discretion in this case, but obviously failed to exercise any discretion in determining whether any penalty should be assessed and, if so, the nature and extent thereof.

Petitioner is entitled to an opportunity to appear before the Commission and submit relevant evidence demonstrating his good faith, his exemplary conduct, and all

other facts which have any bearing upon the final decision of the Commission. At the very least, he was entitled to present an argument on the issue of punishment. He was deprived of that opportunity. And, in any event, the order of the Commission is without warrant in law and is a denial of due process of law under the Fourteenth Amendment.

For these reasons, the Writ should be granted.

Respectfully submitted,

MALCOLM I. FRANK,
HARVEY M. FISHER,
SAMUEL RABAN,
Attorneys for Petitioner.

JOSEPH NESSENFELD,
Of Counsel.

APPENDIX.

EXHIBIT A.

Opinion of Real Estate Commission.

Missouri Real Estate Commission.

In the Matter of:
Frank L. Dittmeier.

Be It Remembered, That the above entitled matter coming on for hearing at 11:00 o'clock a. m., November 21, 1946, in Room 4, Mezzanine Floor, Jefferson Hotel, number 415 North Twelfth Street, in the City of St. Louis, State of Missouri, the following proceedings were had:

Present:

Ray R. Dolan, Chairman, Rolla E. Stephens, Vincent J. O'Flaherty, Jr., J. Julos Brinkman, Esq., Counsel, Richard M. Stout, Esq., Counsel, J. W. Hobbs, Secretary.

Joseph Boxerman, Esq., attorney, appeared for Frank L. Dittmeier.

E. C. Donnelly, Esq., attorney, appeared for Mrs. Maguire.

Thereupon, the cause was taken under advisement by the Missouri Real Estate Commission and thereafter on the 23rd day of January, 1947, the following findings of fact and conclusions of law were unanimously adopted by the Commission (omitting caption and signatures):

This cause having heretofore, on the 21st and 22nd days of November, 1946, been heard by the Commission and taken under advisement all of the Commissioners having read the transcript of proceedings, the following findings of fact were unanimously adopted:

1. The Commission finds as a fact that on the 13th day of July, 1946, Respondent Frank L. Dittmeier sold certain

property located at 4315 Evans Avenue, St. Louis, Missouri, to Henry and Leona Jones under the terms of a certain earnest money contract entered into between said Henry and Leona Jones on the one part and signed by Frank L. Dittmeier, Agent, on the other part, calling for the sale of said property at the price of $6,500.00.

2. The Commission finds as a fact that at such time and at all times herein mentioned, said Henry and Leona Jones were colored people not possessed of a great amount of education and not versed in business matters.

3. The Commission finds as a fact that said Frank L. Dittmeier, although the sale price to said Henry and Leona Jones was supposed to be $6,500.00, knew and has placed a pre-existing first deed of trust against said property in the amount of $4,500.00 from Vito Scalzo to Frank L. Dittmeier, Trustee for William C. Schmitt, dated June 1, 1945, recorded in Book 6351 at page 295 of the records of the Recorder of Deed's Office in the City of St. Louis, Missouri. The Commission further finds that in addition to said $4,500.00 first deed of trust which was assumed by the said Henry and Leona Jones, purchasers, the Respondent accepted earnest money in the sum of $600.00 and secured the signatures of said purchasers to a deed of trust in the amount of $1,895.00 which latter deed of trust is recorded in Book 6334 at page 619 of the records of the Recorder of Deeds in the City of St. Louis, Missouri. The Commission finds that no part of the $4,500.00 first deed of trust had been paid at the time of the closing of the sale. Therefore, the Commission finds that the actual cost to said Henry and Leona Jones of such property was $6,995.00; The Commission further finds that $405.00 was refunded to said Henry and Leona Jones and credit given therefor on the last note of the second deed of trust herein mentioned; that such refund was given after the notice of hearing in this case was served and prior to the hearing in this case.

4. The Commission further finds as a fact that the said Frank L. Dittmeier did not secure by any means the signatures of said Henry and Leona Jones to two certain deeds of trust as alleged in the notice of hearing.

5. The Commission finds as a fact that a proper amount of revenue stamps was affixed to the general warranty deed conveying title to said property.

6. The Commission further finds that in connection with the said deal with Henry and Leona Jones, Respondent Frank L. Dittmeier issued to them, under date of July 13, 1945, a closing statement which was, and was designed to be, misleading, confusing and fraudulent in this, that said closing statement did not mention or account for any deed or deeds of trust on the property sold. The Commission finds that this is a fraudulent practice not to be indulged in by licensed real estate brokers.

7. The Commission finds as a fact that there was a substantial conflict in the evidence regarding representations concerning rules and regulations of the Office of Price Administration regarding the securing of a certificate relating to eviction and the Commission is unable to determine with any reasonable degree of certainty of the facts here in this regard and therefore finds that all facts in the connection should be found in favor of the licensee.

8. The Commission further finds that as a matter of fact the Respondent is not guilty of any of the other charges in Count 1 of the complaint dealing with the sale of real estate at 4315 Evans Avenue to Henry and Leona Jones.

9. The Commission finds as a matter of fact that on or about January 24, 1945, Respondent Frank L. Dittmeier sold real estate located at 4553 Maffitt Avenue, St. Louis, Missouri, to Virginia M. Maguire at a price of $3,350.00; that by trickery, false representations, artifice and deceit, the licensee induced and tricked said Virginia M. Maguire

into signing a warranty deed conveying said property to one Vito Scalzo, straw party for said licensee.

10. The Commission further finds that the trickery and false representations aforesaid were, in part, as follows: that the licensee falsely represented to his client, Virginia M. Maguire, that the holder of the deed of trust on such property was pressing for a foreclosure and that the insurance on said property was subject to cancellation because of the vacancy of said property, when in truth and in fact, as Respondent well knew or should have known, a so-called "vacancy rider" could have been attached to the policy of insurance covering said property.

11. The Commission further finds that the licensee Frank L. Dittmeier had already sold or entered into a contract of sale covering the real estate in question, with one Leonard J. Brady at the time the licensee secured the signature of said Virginia M. Maguire to said warranty deed for a consideration of $325.00 and that at and prior to such time the licensee had been employed by said Virginia M. Maguire as agent to sell such property for her.

12. The Commission further finds that the testimony of said Leonard J. Brady before the Commission, with regard to the dealings and negotiations with the licensee for the purchase of said property, with particular regard to the date on which he testified he purchased it, was knowingly false and perjured.

13. The Commission further finds the facts in favor of said Frank L. Dittmeier with regard to the charge of failure to do certain repair work on the property sold to said Virginia M. Maguire, and further finds that the Respondent is not guilty of fraudulent representation to said Virginia M. Maguire regarding restrictive covenant against negro occupancy of said property.

14. The Commission further finds the Respondent not guilty of any and all other charges in the notice of hearing

contained regarding transactions with Virginia M. Maguire, of which he is not otherwise specifically found guilty herein.

15. The Commission further finds that in the months of March and April, 1946, Respondent Frank L. Dittmeier had dealings with Mr. and Mrs. Walter Green in connection with the sale of certain real estate located in the City of St. Louis, Missouri, at 3122 North Newstead.

16. The Commission finds that the Respondent Frank L. Dittmeier secured the signature of said Mr. and Mrs. Walter Green to an earnest money contract calling for the payment of the purchase price in all cash or in deeds of trust to be placed by Respondent, and that said earnest money contract did not contain any clause for the protection of the purchasers from forfeiture of their earnest money in the event such financing could not be placed.

17. The Commission finds as a fact that the proper real estate practice is to make all earnest money contracts contingent upon proper financing being placed, that is to say that in the event proper financing is not placed that the earnest money will be refunded to the prospective purchaser without deduction.

18. The Commission finds that there were false representations made to said Mr. and Mrs. Greene regarding the rental of said property purchased by them; that said false representations were made by one Vera Nash, a duly licensed salesman acting for and on behalf of Frank L. Dittmeier, Respondent. The Commission finds that it is doubtful whether or not Respondent Frank L. Dittmeier knew the actual monthly rental of said property as alleged in the notice of hearing.

19. The Commission further finds that Respondent committed a fraud and misrepresentation in connection with said sale to said Greens in this: that although he knew, or should have known, that under the regulations of the Office

of Price Administration in such case made and provided, purchasers of real estate had to have actually paid at least twenty percent of the purchase price of such real estate before said Office of Administration in such case made and provided, purchasers of real estate had to have actually paid at least twenty percent of the purchase price of such real estate before said Office of Price Administration would issue a certificate relating to eviction; that he represented to said Mr. and Mrs. Walter Green that the down payment they had made, to-wit, $750.00, was a sufficient down payment to secure a certificate relating to eviction from the Office of Price Administration, when in truth and in fact it was not and Respondent well knew that it was not.

20. The Commission further finds that the Respondent knew and was informed by said Mr. and Mrs. Green that they desired to purchase said property as a residence for themselves.

21. The Commission further finds that in connection with the sale of said real estate to said Mr. and Mrs. Green that the earnest money contract between Respondent, as agent for an undisclosed principal, and said Mr. and Mrs. Green provided "seller will repair and paint window screens, repair chimney where it leaks, and replace light fixtures in dining room and living room without cost to buyer," and that although such a provision was in said earnest money contract, said Frank L. Dittmeier neglected to comply with said contract until after the notice of hearing in this case was served upon him.

22. The Commission further finds that the Respondent Frank L. Dittmeier is not guilty of any of the other charges contained in the notice of hearing with regard to the transaction with said Mr. and Mrs. Green.

Conclusions of Law.

1. The Commission finds, as a matter of law, that the Respondent Frank L. Dittmeier at all times mentioned in

the evidence was subject to the provisions of the Missouri Real Estate Commission Act (Laws of Missouri 1941, pages 424-431).

2. The Commission finds that it has jurisdiction over the person of Frank L. Dittmeier; that a notice has been duly served upon him in the manner provided by law, and that it has jurisdiction over the subject matter.

3. The Commission finds that said Frank L. Dittmeier by the acts found to have been done by him in the foregoing findings of fact, is guilty of violation of Sections 10a and 10g of the Missouri Real Estate Commission Act.

4. The Commission further finds that a proper penalty for each of the acts of which said Frank L. Dittmeier has been found guilty is a suspension of his license for six months.

Wherefore, on motion duly made, seconded and unanimously carried, it was:

Resolved: That the license of Frank L. Dittmeier as a real estate broker be suspended for a period of six months beginning March 1, 1947, and extending through August 31, 1947, and that said Frank L. Dittmeier be and he is hereby ordered to remove all advertising which he may have holding himself out to the public as a licensed real estate broker; ordered not to participate in the business of real estate brokerage in any way during said period; further ordered that said Frank L. Dittmeier shall, upon furnishing the Commission an affidavit that he has complied with this order and has not engaged in the real estate business for the perid of six months herein mentioned, at the conclusion of said six months period that the Commission shall reinstate his license.

Further Resolved: That notice hereof be served upon Frank L. Dittmeier and upon his counsel by registered mail to the last known address of each of them.

EXHIBIT B.

Judgment and Decree of Court.

This cause having heretofore come on to be heard upon the Relator's petition for a writ of review and the Respondent's return to the writ of review, and upon the evidence and proof adduced before the Missouri Real Estate Commission, and having been duly submitted to the Court, and having been fully briefed by counsel for the respective parties, and the Court having fully considered the same and being now sufficiently advised in the premises, doth find that the order and decision of the Respondent, Missouri Real Estate Commission, is not supported by competent and substantial evidence upon the whole record, and that the Relator, Frank L. Dittmeier, is entitled to the relief prayed for in his petition.

Wherefore, it is ordered, adjudged and decreed by the Court that the Return of the Respondent to the Writ of Certiorari be and the same is hereby ordered quashed, and that the order and decision of the Respondent, the Missouri Real Estate Commission, be and the same is reversed, revoked and annulled, and that the Respondent pay the costs of this proceeding and that execution issue therefor.

Dated, August 1, 1949.

(Signed), James F. Nangle,
Judge."

EXHIBIT C.

Opinion and Order of the St. Louis Court of Appeals.

In the St. Louis Court of Appeals.

January Session, 1951.

Frank L. Dittmeier, Respondent, vs. Missouri Real Estate Commission, Appellant.	No. 27,914. Appeal from the Circuit Court, City of St. Louis, Missouri, Hon. James F. Nangle, Judge. Opinion Filed: February 20, 1951. As Modified March 26, 1951.

This is an appeal from the judgment of the circuit court reversing, revoking and annulling the order and decision of the Missouri Real Estate Commission suspending the license of Frank L. Dittmeier as a real estate broker for a period of six months.

Acting pursuant to the authority conferred upon it by the Missouri Real Estate Commission Act, Laws of Missouri 1941, p. 424, Mo. R. S. A., § 8300.10, which authorizes the commission to investigate the business transactions of any real estate broker and to suspend his license if he be found guilty of

"Making substantial misrepresentations or false promises in the conduct of his business, or through agents or salesmen or advertising, which are intended to influence, persuade or induce others." [Section 10 (a)] or

"Any other conduct which constitutes untrustworthy or improper, fraudulent or dishonest dealings, or dem-

onstrates bad faith or gross incompetence." [Section 10 (a)]

the commission issued a notice to respondent, directing him to appear before it to answer certain charges. The charges were set forth in four counts, one of which was abandoned, and on three of which evidence was heard. In due time, the commission made and adopted certain findings of fact and conclusions of law in which respondent was adjudged "guilty of violation of Sections 10a and 10g of the Missouri Real Estate Commission Act." A six months suspension was imposed as a penalty. Thereupon respondent procured an order staying the enforcement of the suspension order pending final disposition of the case and filed proceedings for review in the circuit court.

The order of the commission is subject to review by the courts to determine whether "it is authorized by law" and whether "it is supported by competent and substantial evidence upon the whole record." Constitution of Missouri, 1945, Art. V, Sec. 22. Although the reviewing court cannot substitute its own judgment for that of the administrative tribunal, and should adhere to the rule of due deference to findings of fact involving the credibility of witnesses, its duty is to determine whether the tribunal reasonably could have made its findings and reached its result upon consideration of all of the evidence before it and to set aside decisions clearly against the overwhelming weight of the evidence. Wood v. Wagner Elec. Corp., 355 Mo. 670, 197 S. W. 2d 647; Williams v. International Shoe Co., Mo. App., 213 S. W. 2d 657, loc. cit. 662; Dyche v. Bostian, Mo. Sup., 233 S. W. 2d 721. In determining the sufficiency of the evidence it must be considered in the light most favorable to the finding, Donnelly Garment Co. v. Keitel, 354 Mo. 1138, 193 S. W. 2d 577, together with all reasonable inferences that may be drawn therefrom that seem to support it, and the court must disregard all opposing and unfavorable evidence. Schmidt v. Rice-O'Neill Shoe Co., Mo. App., 226 S. W. 2d 358.

Count 1. Henry and Leona Jones transaction.

The Charge: (1) Entering into an earnest money contract calling for the sale of certain property to Henry Jones and wife for $6,500 and then making the total price to the purchasers $6,995 by "wilfully, fraudulently and illegally, by fraud, trickery, misrepresentation and other unjust and unethical practices," securing the signatures of the Jones couple to two deeds of trust aggregating $6,395, and "wilfully" accepting $600 in cash; and (2) issuing a closing statement to the purchasers which was designedly misleading, confusing and fraudulent, in that it omitted to mention or account for any deed or deeds of trust.

The Findings: (1) That respondent sold the property to Henry Jones and wife under an earnest money contract for a sale price of $6,500; (2) that the purchasers were uneducated colored people not versed in business matters; (3) that the purchasers assumed a first deed of trust for $4,500 which respondent had placed against the property; that respondent secured their signatures to a second deed of trust for $1,895 and accepted $600 cash; that the actual cost to the purchasers was $6,995; and that $405 was refunded by respondent to the purchasers, after notice of hearing had been served; (4) "that the said Frank L. Dittmeier did not secure by any means the signatures of said Henry and Leona Jones to two certain deeds of trust as alleged in the notice of hearing"; (5) that a proper amount of revenue stamps was affixed to the deed; and (6) that respondent issued a closing statement to the purchasers which was designedly misleading, confusing and fraudulent in that it omitted to mention or account for any deed or deeds of trust.

We conclude from an examination of the testimony of Jones and Dittmeier and from the documentary evidence adduced that Findings Nos. 1 and 3 are supported by competent and substantial evidence upon the whole record.

We will not review the evidence thereon in view of the fact that respondent does not contend otherwise on this appeal.

Can Findings Nos. 1 and 3 properly be made the basis for the commission's conclusion that respondent violated Sections 10 (a) or 10 (g) of the Act? We think not. Dittmeier was charged with **fraudulently**, etc., and by **trickery**, securing signatures to two deeds of trust whereby the agreed price of $6,500 was made into a total price of $6,995. Finding No. 4 specifically and completely exonerates and absolves him of any wrongdoing in this connection and prevents the preliminary Findings Nos. 1 and 3 from providing any support for a finding of guilt under the sections cited. If any inference of misconduct could be drawn from Finding No. 3, its force and effect is dissipated by Finding No. 4 and we are obliged to sustain the contentions of respondent in this connection.

Is Finding No. 6 supported by competent and substantial evidence upon the whole record? Respondent's statement introduced in evidence and characterized by appellant as the "closing statement" shows on its face that it is nothing more nor less than a recapitulation of the cash account between the parties in which the closing costs (including items of cost of recording the **first and second deeds of trust**) are itemized. It is not a closing statement in the generally accepted understanding of that term and obviously and patently is insufficient to support the finding. Furthermore, it does in fact refer to deeds of trust.

Count 2. Virginia Maguire transaction.

The Charge: Selling certain property to Virginia Maguire, causing her to become dissatisfied with the property, causing her to list the property with respondent as her agent, and then "by artifice, trickery and deceit" inducing her to sign a deed for a totally inadequate consideration of $325 when her equity in the property was worth $1,000,

and at a time when respondent well knew that he had previously sold the property to one Leonard J. Brady for $4,100, and tricking her to deed the property to a straw party, one Vito Scalzo, a nonexistent person, and an alias assumed by respondent.

The Findings: That on January 24, 1945 respondent sold certain real estate to Mrs. Maguire for $3,350; that by trickery, false representations, artifice and deceit he induced her to sign a warranty deed conveying the property to Vito Scalzo, straw party for respondent; that the trickery consisted of falsely representing to Mrs. Maguire that the holder of the deed of trust was pressing for foreclosure and that the insurance was subject to cancellation because of the vacancy of the property, whereas respondent knew that a vacancy rider could have been attached to the insurance policy; that respondent had already sold or contracted to sell the property to Leonard J. Brady at the time he secured Mrs. Maguire's signature to the deed and that at that time respondent was actually representing Mrs. Maguire as her agent to sell the property for her.

The Evidence: Virginia Maguire testified that on January 24, 1945 through respondent she purchased the property at 4553 Maffitt Avenue for $3,350, paid $300 down, and assumed a mortgage for the balance. The occupants did not quit the premises for three weeks. It was the 16th or 23rd of March, before repairs which respondent agreed to make were completed. Mrs. Maguire did not move into the premises for the reason that her husband, a disabled war veteran, refused to do so, whereupon she went to the Office of Price Administration to secure the right to increase the rental. She waited some 6 or 7 weeks for them to take action. In June, 1945, respondent told her that the mortgage holder had been to the premises; that the weeds were up; that the place had not been cleaned out; that the chickens had been in the cottage at the back; that the mortgage holder was very dissatisfied and that Mrs.

Maguire would "have to do something about it." At that time respondent asked her to let him sell it to some colored people; that he had a client; that he would make her a profit. She at first demurred. He renewed the complaint that the mortgage holder was afraid of a fire (the place was vacant) and again urged her to let him sell it, whereupon she signed a contract during the last part of June or the first week in July to sell the property for $3,750 with a 5% commission to respondent; that respondent placed an advertisement in the St. Louis Post-Dispatch the next day, July 8, 1945, as follows:

"MAFFITT, 4553—4 room frame bungalow vacant; bath, also 1-story frame in rear; $500 cash, balance rent. DITTMEIER, 706 Chestnut, CH 9116";

that on the night of July 11, 1945 she received a special delivery letter from respondent, as follows:

"July 11, 1945

Mrs. Virginia Maguire,
1027 Grattan St.,
St. Louis, Missouri.

Dear Mrs. Maguire:

Will you kindly call at the office Thursday, July 12, between 10:30 and 11:00 o'clock as the holder of the Deed of Trust was here and we would like to talk to you regarding the property being vacant at this time.

Yours very truly,

Frank L. Dittmeier R. E. Co.

By Frank L. Dittmeier.

Special Delivery"

She testified that in response to this letter she went to respondent's office on July 12th and at that time he told her that "they were very badly dissatisfied, that the place was in danger of fire there and the mortgage holder refused to stay on the loan"; that respondent offered her $200 "out of his own pocket" for her to turn the property

back, and that he intended to make some repairs on the place and resell it. She reminded him that he had a contract to sell it for her, a 30-day contract. He told her it would be easy to sell but that he wanted 60 days and asked her to "give him a chance". She again argued that he should try to sell it for her. Then respondent informed her that she would either have to turn the property back on the mortgage holder would "go off of the loan * * * they were going to foreclose at once, * * * take the property at once (within three days) because it was dangerous without insurance * * * the insurance was cancelled or something." She told him "Well, if you are going to take it I won't let you have it for that amount." He offered $225, then $250, $275, $300, then $325. Mrs. Maguire agreed to take $325 which was paid to her at the time, and on that day, July 12, 1945, she executed a warranty deed to Vito Scalzo, straw party for respondent.

Mrs. Maguire had placed a chair, bed, stove and some other odds and ends of furniture in the house. After the execution of the warranty deed and on the same day she took a streetcar to the property, found that the back door had been broken in, the Yale locks, which she had placed on the doors changed, and she was unable to get into the house. The next day, July 13th, she returned to the house. Respondent's son let her in with a key. When she finally gained entrance to the premises she found that "the windows had been cleaned, furniture and things had been put back and straightened around * * * my husband's tools gone from the place * * *."

Mrs. Maguire further testified that when she was unable to get into the house on the 12th she called respondent, who stated that he had nothing to do with the new locks or the breaking of the door; and that on the 13th when she was in touch with him again respondent "said he had sold it." Respondent told her that the door must have been broken open by workmen on the 12th.

Respondent conceded that he wrote the letter of July 11th and had a conference with Mrs. Maguire on July 12th, at which time he bought the property for $325. He would not deny having advertised the property in the newspaper, stating "We might have advertised it." The following appears in the record:

> "Q. Did you try to sell Brady prior to the 12th of July? A. Yes, I tried to sell it—that was the usual——
>
> Q. That was about the 8th of July? A. I had . . . ."

Leonard J. Brady, the purchaser from respondent, testified that he saw the advertisement in the Sunday paper, went out to see the property by himself on Wednesday or Thursday of that week, looked in the windows of the houses, determined to make a down payment on the property, drew some money out of a bank and went to the office of respondent for the first time on July 14th; that he purchased the property then and there for $3,750 and made a $200 down payment under the earnest money contract.

The deed from Vito Scalzo to Leonard J. Brady was dated and acknowledged July 14, 1945, and was filed for record on July 18, 1945.

Mrs. Maguire testified that in a subsequent conversation between her and Brady with reference to the matter, the latter made this statement, referring to respondent:

> "Listen, don't let him tell you that sale was the 14th; that sale was made long before the 14th and done with before the 14th."

This hearsay testimony is not "competent and substantial evidence" and could not provide the legal basis for a finding of fact by the commission. State ex rel. De Weese v. Morris, 359 Mo. 194, 221 S. W. 2d 206.

If the findings are to be upheld they must be upheld on the basis of circumstantial evidence. Probative circumstantial evidence may be sufficient to prove the performance or attempt to perform the acts proscribed by the statute. State ex rel. De Weese v. Morris, supra.

In civil jury cases the proof of circumstantial evidence "must be such that the necessary facts to support a verdict may be inferred and must reasonably follow" and "the evidence must exclude guesswork, conjecture and speculation as to the existence of the necessary facts" and the proof should have a tendency "to exclude every other reasonable conclusion but the one desired." Bowers v. Columbia Terminals Co., Mo. App., 213 S. W. 2d 663.

Certainly no less degree of proof should be required in a proceeding such as this where an effort is being made to suspend the license of a real estate broker which, if successful, will necessarily deprive him of his means of livelihood, at least temporarily.

While it is true that there is no evidence that the representations made by respondent that the mortgage holder was dissatisfied, wanted off the loan and was about to foreclose, etc., and that the insurance was subject to cancellation, were **false**, nevertheless we must consider these representations, whether true or false, in the light of the relation which was then existing between respondent and Mrs. Maguire, that of customer and broker. It was a confidential and fiduciary relationship under which respondent was obligated to be perfectly frank with his principal, to make a complete and full disclosure of all material facts concerning the transaction which might affect her decision to sell her property to him, to be loyal to his client, and to exercise the utmost fidelity and good faith towards her. Johnston v. McCluney, Mo. App., 80 S. W. 2d 898. He was under ties of obligation as exacting as those imposed on a trustee in favor of his beneficiary. If respondent had sold or contracted to sell the property

to Brady prior to July 12th respondent was under an absolute obligation to reveal that fact to his client. Garner v. Woods, Mo. App., 24 S. W. 2d 708.

> "Before dealing with the principal on his own account . . . an agent has a duty, not only to make no misstatements of fact, but also to disclose to the principal all material facts fully and completely. A fact is material . . . if it is one which the agent should realize would be likely to affect the judgment of the principal in giving his consent to the agent to enter into the particular transaction on the specified terms. Hence, the disclosure must include not only the fact that the agent is acting on his own account . . ., but also all other facts which he should realize have . . . a bearing upon the desirability of the transaction from the viewpoint of the principal." Restatement of Agency, Section 390, Comment A.

Fraud may be shown by concealment with intent to defraud as well as by misrepresentation if such concealment is material. Klika v. Albert Wenzlick Real Estate Co., Mo. App., 150 S. W. 2d 18, loc. cit. 24.

Even if the contract to sell to Brady had not actually been consummated it was respondent's duty to reveal the fact that Brady was interested in the property and was a prospect for the sale of the property, if that were true. The fact that respondent had a contract to sell the property, had advertised it for sale, had tried to sell it to Brady on the 8th of July; that Brady had looked at the property on the 11th of July; that on July 13th respondent stated to Mrs. Maguire that he "had sold it"; that someone had entered the house, straightened up the furniture and placed new locks on the doors apparently before her execution of the deed to respondent, and that within the short time of two days thereafter respondent's straw party executed a deed to Brady, together with the other evidence above referred to, together with the reasonable inferences that may

be drawn therefrom, is sufficient competent, circumstantial evidence upon the basis of which the commission properly could make the finding that respondent had already sold or contracted to sell the property to Brady at the time he procured the deed from Mrs. Maguire.

This alone is sufficient to justify the finding of a violation of Section 10 (g) of the Act and the imposition of a suspension of respondent's license.

Count 3. Walter and Lela B. Greene transaction.

The Charge: Securing the signatures of the Greenes to an earnest money contract calling for the payment of the purchase price in all cash or deeds of trust to be placed by respondent, which contract did not contain any clause for the protection of the purchasers from forfeiture of earnest money in the event such financing could not be placed, contrary to good real estate practice requiring the earnest money contract to be contingent upon the placing of proper financing; misrepresenting the income from the property; fraudulent misrepresentation concerning the purchasers' ability to get OPA certificates of eviction when they were not eligible therefor because they had not paid in at least 20% of the purchase price; fraudulently tricking and deceiving the purchasers by failing and refusing to make repairs as agreed to in the earnest money contract; fraudulently and improperly representing clients by receiving an excessive commission for the placing of the financing, misrepresenting to the Greenes that financing under the G. I. Bill of Rights was unavailable and inducing them to permit respondent to place the loans.

The Findings: The securing of the signatures and the omission of the clause, as charged; that the proper real estate practice is to make all earnest money contracts contingent upon the placing of proper financing; that false representations were made to the Greenes regarding the rental of the property by one Vera Nash, an agent of respondent; that "The Commission finds that it is doubt-

ful whether or not Respondent Frank L. Dittmeier knew the actual monthly rental of said property as alleged in the notice of hearing"; that respondent knowingly committed a fraud and misrepresentation with reference to the eligibility of the Greenes for certificate of eviction by representing to them that the $750 down payment they made was sufficient to secure such a certificate from the Office of Price Administration when in truth and in fact it was not; that respondent knew and was informed that the Greenes desired to purchase the property as a residence for themselves; that although the earnest money contract provided that "seller will repair and paint window screens, repair chimney where it leaks, and replace light fixtures in dining room and living room without cost to buyer," respondent neglected to comply with said contract until after the notice of hearing in this case was served upon him.

Omission of clause relieving against forfeiture:

While the earnest money contract contained no provision relieving against forfeiture of the earnest money in case financing could not be arranged this did not make a case against respondent for the reason that there is no statute requiring such a provision in an earnest money contract, nor is there any evidence in this record that the commission has promulgated rules or regulations requiring the same, or that the inclusion of such a provision is a custom or a generally accepted standard of real estate practice in the community. There was no evidence that as a result of this omission the Greenes were imposed upon, overreached or damaged; or that a forfeiture or loss was occasioned to anyone, or that any forfeiture was attempted to be enforced. There was no evidence from which it could be concluded that respondent employed this form of contract in any fraudulent or dishonest manner, or in bad faith.

Representations re rentals: In a proceeding of this kind a real estate broker cannot be held responsible for the acts

of an employee under the rule of respondeat superior, in the absence of proof of culpable fault or intentional misconduct on his part toward his client. Davis v. Missouri Real Estate Commission, Mo. App., 211 S. W. 2d 737.

Representations re OPA certificates: There is not a scintilla of evidence in the record to support this finding. The Greenes talked to the OPA officials and to their attorney after the earnest money contract was signed but there is no evidence that they talked to respondent concerning the OPA requirements.

Failure to make repairs: Under the contract "seller" was obligated to repair and paint window screens, repair chimney leaks and replace light fixtures in dining and living rooms. Mrs. Greene testified that respondent paid her for the new light fixtures, and that she did not know whether the screens were painted and repaired or whether the chimney was repaired. Mr. Greene testified that the screens had been painted but not repaired. He did not know whether the chimney had been repaired.

The complaint charged fraud, trickery and deceit. The best that can be said of the uncertain, indefinite and ambiguous evidence in support of this charge is that it proved neglect. It certainly did not rise to the gravity of fraudulent, untrustworthy, improper or dishonest dealings, nor did it demonstrate bad faith, within the intendment of Section 10 (g) of the Act.

We conclude that Findings of Fact Nos. 1, 2, 3, 4, 5, 7, 8, 11, 12, 13, 14, 15, 16, 21 and 22 are supported by competent and substantial evidence upon the whole record; that Findings of Fact Nos. 6, 9, 10, 17, 18, 19 and 20 are not so supported; that the commission reasonably could not have reached its conclusion that respondent was guilty of violation of Section 10 (a) of the Missouri Real Estate Commission Act as set forth in its Conclusion of Law No. 3; that the commission, reasonably could have reached

the conclusion that Frank L. Dittmeier was guilty of violation of Section 10 (g) of said Act upon a consideration of all the evidence before it; that Finding of Fact No. 11 "that the licensee Frank L. Dittmeier had already sold or entered into a contract of sale covering the real estate in question, with one Leonard J. Brady at the time the licensee secured the signature of said Virginia M. Maguire to said warranty deed for a consideration of $325.00 and that at and prior to such time the licensee had been employed by said Virginia M. Maguire as agent to sell such property for her" is a sufficient basis upon which to find Frank L. Dittmeier guilty of a violation of Section 10 (g) of the Act; that the judgment of the circuit court should be reversed; that the case should be remanded to the commission with directions to set aside its Findings of Fact Nos. 6, 9, 10, 17, 18, 19 and 20 and to set aside its finding that respondent was guilty of violation of Section 10 (a) of the Missouri Real Estate Commission Act, to set aside its assessment of a six months' suspension as a penalty for the violation of Sections 10 (a) and 10 (g) of said Act, and for the assessment of whatever penalty in its discretion the commission may deem proper under the circumstances for the violation of Section 10 (g) of said Act. The Commissioner so recommends.

Norwin D. Houser,
Commissioner.

Per curiam:

The foregoing opinion of Houser, C., is adopted as the opinion of the court.

The judgment of the circuit court is, accordingly, reversed and the cause remanded.

Lyon Anderson, Presiding Judge, Concurs.

Edward J. McCullen, Judge, Concurs.

W. E. Bennick, Judge, Concurs.

EXHIBIT D.

Opinion of Real Estate Commission.

Exhibit A to Petition for Review.

Received
Jun 1 10:28 AM 1951
Mo. Real Estate
Commission

Missouri Real Estate Commission.

In the Matter of
Frank L. Dittmeier

Pursuant to the opinion of the St. Louis Court of Appeals, in the case of Frank L. Dittmeier, Respondent, vs. Missouri Real Estate Commission, Appellant, No. 27914, the Missouri Real Estate Commission hereby makes the following findings of fact, conclusions of law and order in the above matter:

1. The Commission finds as a fact that on the 13th day of July, 1946, respondent, Frank L. Dittmeier, sold certain property located at 4315 Evans Avenue, St. Louis, Missouri, to Henry and Leona Jones under the terms of a certain earnest money contract entered into between said Henry and Leona Jones on the one part and signed by Frank L. Dittmeier, agent, on the other part, calling for the sale of said property at the price of $6,500.00.

2. The Commission finds it a fact that at such time and at all times herein mentioned, said Henry and Leona Jones were colored people not possessed of a great amount of education and not versed in business matters.

3. The Commission finds it a fact that said Frank L. Dittmeier, although the sale price to said Henry and Leona

Jones was supposed to be $6,500.00, knew and had placed a pre-existing first deed of trust against said property in the amount of $4,500.00 from Vito Scalzo to Frank L. Dittmeier, Trustee for William C. Schmitt, dated June 1, 1945, recorded in Book 6351 at page 295 of the records of the Recorder of Deed's Office in the City of St. Louis, Missouri. The Commission further finds that, in addition to said $4,500.00 first deed of trust which was assumed by the said Henry and Leona Jones, purchasers, the respondent accepted earnest money in the sum of $600.00 and secured the signatures of said purchasers to a deed of trust in the amount of $1,895.00, which latter deed of trust is recorded in Book 6334 at page 619 of the records of the Recorder of Deeds in the City of St. Louis, Missouri. The Commission finds that no part of the $4,500.00 first deed of trust had been paid at the time of the closing of the sale. Therefore, the Commission finds that the ~~actual~~ cost to said Henry and Leona Jones of such property was $6,995.00; the Commission further finds that $405.00 was refunded to said Henry and Leona Jones and credit given therefor on the last note of the second deed of trust herein mentioned; that such refund was given after the notice of hearing in this case was served and prior to the hearing in this case.

4. The Commission further finds as a matter of fact that said Frank L. Dittmeier did not secure by any means the signatures of said Henry and Leona Jones to two certain deeds of trust, as alleged in the notice of hearing.

5. The Commission finds as a fact that a proper amount of revenue stamps was affixed to the general warranty deed conveying title to said property.

6. The Commission finds as a fact that there was a substantial conflict in the evidence regarding representations concerning rules and regulations of the Office of Price Administration regarding the securing of a certificate re-

lating to eviction and the Commission is unable to determine with any reasonable degree of certainty the facts here in this regard and therefore finds that all facts in this connection should be found in favor of the licensee.

7. The Commission further finds that as a matter of fact the respondent is not guilty of any of the charges in Count I of the complaint dealing with the sale of real estate at 4315 Evans Avenue to Henry and Leona Jones.

8. The Commission finds that the licensee, Frank L. Dittmeier, had been employed by Virginia M. Maguire as agent to sell for her certain property located at 4553 Maffitt Avenue, St. Louis, Missouri; that licensee secured the signature of said Virginia M. Maguire to a warranty deed for a consideration of $325.00 conveying said property to Vito Scalzo, straw party for said licensee; that, at the time such warranty deed was obtained, licensee, Frank L. Dittmeier, had already sold or entered into a contract for sale covering the real estate in question with one Leonard J. Brady; that at and prior to such time the licensee had been employed by said Virginia M. Maguire as agent to sell such property for her.

9. The Commission further finds that the testimony of said Leonard J. Brady before the Commission, with regard to the dealings and negotiations with the licensee for the purchase of said property, with particular regard to the date on which he testified he purchased it, was knowingly false and perjured.

10. The Commission further finds the facts in favor of said Frank L. Dittmeier with regard to the charge of failure to do certain repair work on the property sold to said Virginia M. Maguire, and further finds that the respondent is not guilty of fraudulent representation to said Virginia M. Maguire, regarding restrictive covenants against Negro occupancy of said property.

11. The Commission further finds the respondent not guilty of any and all other charges in the notice of hearing contained regarding transactions with Virginia M. Maguire, of which he is not otherwise specifically found guilty herein.

12. The Commission further finds that in the months of March and April, 1946, respondent, Frank L. Dittmeier, had dealings with Mr. and Mrs. Walter Green in connection with the sale of certain real estate located in the City of St. Louis, Missouri, at 3122 North Newstead.

13. The Commission further finds that the respondent, Frank L. Dittmeier, is not guilty of any of the other charges contained in the notice of hearing with regard to the transaction with said Mr. and Mrs. Green.

Conclusions of Law.

1. The Commission finds as a matter of law that the respondent, Frank L. Dittmeier at all times mentioned in the evidence was subject to the provisions of the Missouri Real Estate Commission Act (Laws of Missouri 1941, pages 424-431).

2. The Commission finds that it has jurisdiction over the person of Frank L. Dittmeier; that a notice has been duly served upon him in the manner provided by law and that it has jurisdiction over the subject matter.

3. The Commission finds that said Frank L. Dittmeier, by the acts found to have been done by him in the foregoing finding of fact numbered 8, is guilty of a violation of Section 10g of the Missouri Real Estate Commission Act.

4. The Commission further finds that a proper penalty for the violation by said licensee of said Act is a suspension of his license for Six (6) months.

Order.

Therefore, the Missouri Real Estate Commission hereby orders that the license of Frank L. Dittmeier as a real estate broker be suspended for a period of Six (6) months beginning July 1, 1951, and extending through December 31, 1951, and that said Frank L. Dittmeier be and he is hereby ordered to remove all advertising which he may have holding himself out to the public as a licensed real estate broker; ordered not to participate in the business of real estate brokerage in any way during said period; further ordered that said Frank L. Dittmeier shall, upon furnishing the Commission an affidavit that he has complied with this order and has not engaged in the real estate business for the period of Six (6) months herein mentioned, at the conclusion of said Six (6) months period, have his license reinstated by the Commission.

It Is Further Ordered that notice hereof be served upon Frank L. Dittmeier and upon his counsel by registered mail to the last known address of each of them.

Rolla E. Stephens,
Ray R. Dolan,
Frank Woodward,
Members,
Missouri Real Estate Commission.

Attest:

John W. Hobbs,
Secretary.

EXHIBIT E.

Judgment of St. Louis Circuit Court.

Thereafter and on May 4, 1956, the Court made and entered of record the following order and judgment, appearing in Record Book 837 at page 115 (which order and judgment became final on July 23, 1956, with the denial of petitioner's motions for a new trial and rehearing):

This cause having heretofore been tried before the Court on the 7th day of December, 1955, and having been submitted to the Court upon relator's petition for writ of review and respondent's return to writ of review and upon the evidence and proof adduced before the Missouri Real Estate Commission, and said parties having been granted time within which to submit briefs and on the 23rd day of February, 1956, the last brief having been received by the Clerk, this cause was taken as submitted, and now at this day the Court being sufficiently advised of and concerning the premises, doth find that the plaintiff is not entitled to the relief prayed for in his petition, and that the order and decision of the Missouri Real Estate Commission be affirmed.

Wherefore, it is considered and adjudged by the Court that the petitioner take nothing by reason of his cause of action, and that the respondent be discharged and go hence without day as to said cause of action, and that the order and decision of the respondent Missouri Real Estate Commission be and the same is in all things hereby approved, confirmed and affirmed, and that the costs of this proceeding be paid by petitioner, and execution issue therefor.

EXHIBIT F.

Opinion and Order of the Supreme Court of Missouri.

In the Supreme Court of Missouri,
Division Number Two.

September Session, 1957.

Frank L. Dittmeier,
Appellant,
vs.
Missouri Real Estate Commission,
Respondent.
No. 45,847.

Appeal From the Circuit Court of the City of St. Louis,
Honorable Ivan Lee Holt, Jr., Judge.

Frank L. Dittmeier, appellant, was charged in four counts with violating provisions of the Missouri Real Estate Commission Act. Laws 1941, p. 425, §§ 1-20, R. S. Mo. 1949, Chapter 339. Statutory references are to said Act, R. S. Mo. 1949, and V. A. M. S., unless otherwise indicated. One count was abandoned. The cause was heard on the three remaining counts in the City of St. Louis in November, 1946, was taken under advisement by the Commission, and, on January 23, 1947, the Commission found appellant guilty on each of the three counts, found he had violated § 10 (a) and § 10 (g) (§ 339.100 (1, 7)) of the Act and suspended his license as a real estate broker for six months. We have appellate jurisdiction because of the constitutional due process of law issue mentioned infra. State ex rel. v. McElhinney, 241 Mo. 592, 606, 145 S. W. 1139, 1142 [2]; Farmers Drainage Dist. v. Sinclair Refining Co., Mo., 255 S. W. 2d 745, 746 [1].

Upon appellant's petition for review the Circuit Court of the City of St. Louis quashed and vacated said order. The Commission appealed and the St. Louis Court of Appeals held the Commission's findings of guilt under Counts 1 and 3 were not supported by the evidence; but held that the finding of guilt under Count 2 was supported by competent substantial evidence, and that appellant had violated § 10 (g) (§ 339.100 (7)) of the Act.

The opinion of the Court of Appeals is found in Dittmeier v. Missouri Real Estate Commission, Mo. App., 237 S. W. 2d 201, which is here referred to for the detailed facts involved on that appeal. Said facts are only outlined so far as material here as this appeal involves the subsequent proceedings of the Commission had under the mandate of the Court of Appeals.

Section 10 (g) (§ 339.100 (7)) of the Act provides that the Commission has power "to suspend or revoke any license" of any real estate broker "if the licensee is performing or attempting to perform any of the following acts or is deemed to be guilty of: * * * (g) Any other conduct which constitutes untrustworthy or improper, fraudulent or dishonest dealings, or demonstrates bad faith or gross incompetence."

In Count 2 before the Commission appellant was charged with selling certain property to Virginia Maguire, causing her to become dissatisfied with the property, causing her to list the property with appellant as her agent, and then "by artifice, trickery and deceit" inducing her to sign a deed for a totally inadequate consideration of $325.00 when her equity in the property was worth $1,000.00, and at a time when appellant well knew that he had previously sold the property to one Leonard J. Brady for $4,100.00, and tricking her to deed the property to a straw party, one Vito Scalzo, a nonexistent person, and an alias assumed by

appellant. The Court of Appeals after reviewing the evidence held there was sufficient substantial evidence to sustain the Commission's finding "'that the licensee Frank L. Dittmeier had already sold or entered into a contract of sale covering the real estate in question, with one Leonard J. Brady at the time the licensee secured the signature of said Virginia M. Maguire to said warranty deed for a consideration of $325 and that at and prior to such time the licensee had been employed by said Virginia M. Maguire as agent to sell such property for her.'" The Court of Appeals reversed and remanded the cause with directions that the Commission set aside certain findings of fact, set aside the six months' suspension of appellant's license for violation of § 10 (a) and § 10 (g) (§ 339.100 (1, 7)) of the Act and for the assessment or whatever penalty in its discretion the Commission might deem proper in the circumstances for the violation of § 10 (g) of said Act. Dittmeier v. Missouri R. E. Comm., Mo. App., 237 S. W. 2d 201, 204 (Count 2, [11]), 208. This opinion was handed down, as modified on denial of rehearing, on March 26, 1951.

On June 28, 1951, appellant received the findings of fact, conclusions of law, and order entered by the Commission on June 27, 1951, upon the remand of said proceeding to the Commission, suspending his license for six months.

Appellant thereupon instituted the instant proceeding for review. The Circuit Court of the City of St. Louis affirmed said order of June 27, 1951, and this appeal, in due course, followed.

Section 536.130 specifies what shall constitute the record upon a review of an order of administrative officers. Section 536.140 provides, so far as material here: "1. The court shall hear the case without a jury and * * * shall hear it upon the petition and record filed as aforesaid."

The record, certified by the Secretary of the Commission, consisted of the notice of the hearing held November 21 and 22, 1946, which notice set forth in detail the charges against appellant in the separate counts; the appearance of an attorney on behalf of appellant; the taking of the case under advisement by the Commission; the findings, conclusions of law, and the order of the Commission of January 23, 1947, and the order entered by the Commission on June 27, 1951, after the case had been remanded with directions by the Court of Appeals, which order was served on appellant on June 28, 1951. The Court of Appeals' opinion discloses that appellant testified at said hearing on November 21 and 22, 1946, but the evidence adduced at the hearing is omitted by agreement of counsel from the transcript filed here. There is no showing of record of the modification made by the Court of Appeals in its opinion on the denial of a rehearing or the contentions of the parties in connection therewith.

At the instant hearing it was agreed between the parties that the Commission gave no notice to appellant of its intention to take action pursuant to the mandate of the Court of Appeals; that no hearing was held with respect to the findings, decision and order issued in pursuance to said mandate; and that Commissioner Vincent J. O'Flaherty, Jr., who participated in the issuance of the order of January 23, 1947, had been replaced as a member of the Commission by Frank Woodward, who participated in the issuance of the order of June 27, 1951.

The main contention of appellant presented in the trial court and kept alive here is that the failure of the Commission to give him notice and an opportunity to be heard with respect to the order to be entered upon receipt of the mandate of the Court of Appeals deprived appellant of his property without due process of law in contravention of Amendment XIV of the Constitution of the United States and Article 1, § 10, Mo. Const. 1945.

Appellant was afforded a full opportunity for the trial of all issues in his case at the hearing held on November 21 and 22, 1946, including what action should be taken upon a finding that he had violated any provision of the Missouri Real Estate Commission Act. Appellant states such proceedings are not essentially punitive in nature but have for their fundamental purpose the protection of the public from incompetent or improper licensees. "The demands of due process do not require a hearing at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." Opp Cotton Mills v. Administrator of W. and H. D. etc., 312 U. S. 126, 152, 153, 61 S. Ct. 524, 85 L. Ed. 624; State ex rel. v. Harris, 353 Mo. 1043, 186 S. W. 2d 31, 34 [8]; 16A C. J. S. 861, § 628b (2).

In Hoppe v. St. Louis Pub. Serv. Co., 361 Mo. 402, 235 S. W. 2d 347, 351, stressed by appellant, judgment was entered for defendant upon the verdict of the jury. The plaintiff failed to timely file (§ 510.340) a motion for new trial and on the 29th day after judgment the court struck the motion, which was filed too late, from the record and "of its own initiative" under § 510.370, without notice or hearing, granted plaintiff a new trial on the ground "the verdict and judgment is against the evidence and against the weight of the evidence." Considering the circumstances that after the tenth day there existed of record only the final judgment in defendant's favor (§ 510.340), and that a party over whom the court has obtained jurisdiction is not regarded as being before the court after final judgment, we held that the court in granting the new trial under § 510.370 "for a substantially unappealable reason" without notice or hearing to the party affected was arbitrary and set the order aside. That is n[ot] the instant situation. This proceeding was before a [ad]ministrative body of continuing existence which conducted the original

hearing. It is not a jury-tried case. The instant record discloses no final judgment freeing appellant from action by the Commission. At all the times involved appellant was before the Missouri Real Estate Commission or before the courts of this state under Count 2 of the charges filed against him. So far as any constitutional right to due process is concerned, it was within the discretion of the Commission to conduct only a reconsideration of the record made or, as a matter of grace, a second hearing. See Nyman v. Jeffries, 302 Mich. 520, 5 N. W. 2d 449 [3]. No request was made by appellant for a hearing. The constitutional requirement of due process of law was fully met.

In connection with the foregoing, we note the following conclusion of law found in the Commission's order of January 23, 1947: "4. The Commission further finds that a proper penalty for **each of the acts** of which said Frank L. Dittmeier has been found guilty is a suspension of his license for six months." (Emphasis supplied.) However, instead of suspending appellant's license for six months on each of the findings the Commission suspended his license for only one period of six months.

Appellant next argues that the Commission may suspend a license "only after a hearing" (Laws 1941, p. 429, § 11; § 339.080) and that the order of June 27, 1951, was the result of unlawful procedure, was arbitrary and capricious, and involved an abuse of discretion within § 536.140, ¶ 2 (5, 6, 7) because no notice was given or hearing held with respect thereto. Appellant directs our attention to no statutory requirement for a second hearing, after notice, upon a remand for the assessment of the penalty; and with no statutory requirement for a second hearing what we have heretofore stated is applicable. Said § 536.140, ¶ 5, provides, among other things, that the court "may order the reconsideration of the case in the light of the court's opinion and judgment," and we think this was the

effect of the opinion of the Court of Appeals on the issue of the penalty. The Court of Appeals did not affirmatively direct a second hearing or a new trial on said issue. The point is overruled.

Section 536.080 provides: "Whenever in a contested case, all of the officials of the agency who are to render the final decision do not hear or read the evidence, such decision shall not be rendered by the agency until each party to the proceedings has been afforded an opportunity to present arguments, either oral or written, to all of the officials who are to render the decision. * * * The parties may by written stipulation waive compliance with this section." (This section was amended by Laws 1957, p. ..., S. B. No. 176.)

In the interim between the order of January 23, 1947, and the order of June 27, 1951, here involved, Frank Woodward replaced Vincent J. O'Flaherty, Jr., as a member of the Commission. Commissioner Woodward concurred in the order of June 27, 1951, with the two commissioners who originally had heard the evidence and read the transcript of the proceedings before entering the order of January 23, 1947. The order of June 27, 1951, does not affirmatively disclose that Commissioner Woodward read the evidence, and appellant contends that since he was not afforded an opportunity to present an argument to the Commission under the provisions of § 536.080 the order of June 27, 1951, should be set aside.

The terms of the Missouri Real Estate Commissioners are so staggered that the term of a commissioner expires each year, and the evident intent of the General Assembly is that upon the appointment of a new member a second hearing of pending matters is not necessary. If Commissioner Woodward read the evidence, § 536.080 did not require that an opportunity be afforded to present argu-

ments to the commissioners rendering the decision. Appellant had the burden of showing that Mr. Woodward did not read the evidence. Appellant did not do this. The Commission had jurisdiction of the subject matter and the defendant. There is a presumption that public officials have rightfully and lawfully discharged their official duties until the contrary appears. Our Administrative Procedure Act provides that upon judicial review of a decision or order of an administrative officer or body: "The court may in any case hear and consider evidence of alleged irregularities in procedure or of unfairness by the agency not shown in the record." § 536.140, ¶ 4. Of an attack against a final award, after review before the entire Workmen's Compensation Commission, we said: "So far as the record shows, there was no irregularity in the proceedings. Irregularity cannot be presumed. The presumption is to the contrary, to wit, that public officials have properly performed their duties. [Citing authority.] There is nothing in the record to even show what order the Workmen's Compensation Commission made, whether or not there was notice, who was present, what facts were found, or what hearing was had. In the absence of any showing that appellant asked to be permitted to produce any further evidence or to be further heard on any phase of the case, we must assume that the Workmen's Compensation Commission acted properly and regularly in making its review." Waterman v. Chicago Bridge & Iron Works, 328 Mo. 688, 41 S. W. 2d 575, 578 [7-9]. Anniston Manufacturing Co. v. Davis, 301 U. S. 337, 357, 57 S. Ct. 816, 81 L. Ed. 1143, states it is assumed that an administrative board considers the evidence and bases its findings and decision thereon until the contrary appears. See also Woolridge v. La Crosse Lumber Co., 291 Mo. 239, 236 S. W. 294, 297 [5]; Lewis v. United States, 279 U. S. 63, 73, 49 S. Ct. 257, 73 L. Ed. 615. It is proper and best for State agencies to affirmatively disclose that statutory procedural steps have

been followed. The presumption that Commissioner Woodward read and considered the evidence and reached his own independent judgment is not rebutted of record.

Appellant says the finding of facts is insufficient to sustain the conclusion of misconduct and the holding of the Court of Appeals and the action of the Commission in following said holding are void and open to attack under § 536.100 at any time. As we read it, the opinion of the Court of Appeals discloses its holding that appellant was guilty of improper conduct within the provisions of § 10 (g) (§ 339.100 (7)) of the Act was supported by the evidence. In addition, the Court of Appeals had jurisdiction over the subject matter and over the person of appellant, had jurisdiction to rule, and its holding was not a void judgment even if erroneous. We have held " 'that when a court has jurisdiction, it has jurisdiction to commit error' "; and "that an erroneous judgment has the same effect as to res judicata as a correct one." Metcalf *v.* American Surety Co. of N. Y., 360 Mo. 1043, 232 S. W. 2d 526, 529 [1-3]; McIntosh v. Wiggins, 356 Mo. 926, 204 S. W. 2d 770, 772 [6, 6], and authorities cited in said cases. The issue stands res judicata.

The judgment is affirmed.

Walter H. Bohling,
Commissioner.

Per Curiam: The foregoing opinion by Bohling, C., is adopted as the opinion of the court.

All concur.

Barrett, C., concurs.

Stockard, C., concurs.

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Office-Supreme Court, U.S.
FILED
JAN 8 1959
JAMES R. BROWNING, Cl

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 565.

FRANK L. DITTMEIER,
Petitioner,

vs.

MISSOURI REAL ESTATE COMMISSION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION.

JOHN M. DALTON,
Attorney General of Missouri,
ROBERT R. WELBORN,
Assistant Attorney General of Missouri,
Supreme Court Building,
Jefferson City, Missouri,
Attorneys for Respondent.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 565.

FRANK L. DITTMEIER,
Petitioner,

vs.

MISSOURI REAL ESTATE COMMISSION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION.

OPINIONS BELOW.

The petition herein (pp. 1-3) sets out the opinions of the courts below which are involved in this case.

JURISDICTION.

The petitioner herein relies upon the provisions of Section 125 (3) of Title 28, U. S. C. A., as authority for the Court to consider the petition.

QUESTION PRESENTED.

The only question which might properly be before this Court on the review of this cause would be whether or not, when the petitioner's license as a real estate broker had been suspended by respondent for a period of six months after a full administrative hearing on three counts of misconduct charges and the reviewing court found that the findings on one of the charges against the petitioner were supported by substantial and competent evidence and remanded the matter to respondent with directions to set aside its previous order and "to set aside its assessment of a six months' suspension as a penalty for the violation of Sections 10 (a) and 10 (g) of said [Missouri Real Estate Commission] Act and for the assessment of whatever penalty in its discretion the Commission may deem proper under the circumstances for the violation of Section 10 (g) of said Act," the Due Process Clause of Amendment XIV to the Constitution of the United States was violated by the action of the respondent in entering a new order pursuant to the judgment of the reviewing court without giving petitioner notice of its intention to enter such new order and an opportunity to be heard before respondent prior to the entry of such new order.

The other matters referred to by petitioner in his statement of the questions presented (Petition, pp. 3-5) would not be before the Court because they were never presented in the state courts as involving federal constitutional considerations.

CONSTITUTIONAL PROVISIONS INVOLVED.

The provisions of the XIV Amendment to the Constitution of the United States set out in the petition (p. 7) would be involved.

STATUTES INVOLVED.

Respondent feels that no statutory provisions would be properly before this Court on review of this cause.

STATEMENT OF FACTS.

The petition (pp. 7-11) sets out the fact material to the consideration of the question presented. The last two paragraphs of such statement refer to matters which, in respondent's view, would not be before this Court on review.

QUESTIONS RAISED BELOW.

The judicial action presently sought to be reviewed was begun by the filing, on June 30, 1951, of a petition (Transcript, pp. 1-11) by the petitioner herein in the Circuit Court for the City of St. Louis, in which he sought the review of an order of the respondent served upon the petitioner on June 28, 1951. Such petition sought to have said order set aside upon numerous grounds. Among such grounds were the following which presented questions under the Constitution of the United States:

> "17. That the said finding, decision and order is in violation of Article I, Section 10 of the Constitution of Missouri, 1945, and the 14th Amendment to the Constitution of the United States, which provide that no person shall be deprived of life, liberty and property without due process of law; and by failing to give petitioner notice of any kind and an opportunity to appear and be heard with respect to the action to be taken by the Commission, the Commission has denied to petitioner due process of law" (Transcript, pp. 4-5).

Paragraph 26 of the petition (Transcript, p. 6) also attacked the validity under the Due Process Clause of the

XIV Amendment to the Constitution of the United States, the statute under which the respondent acted, on the grounds that such statute set up no ascertainable standards of guilt. This contention, however, was not urged in the Supreme Court of Missouri.

Paragraph 18 of the petition for review set forth the following allegations of grounds for the setting aside of the order of respondent:

> "18. That no hearing of any kind was held with respect to the said finding, decision and order and the same was arbitrarily entered by the Missouri Real Estate Commission; that the Commission followed no lawful procedure in making and entering the same and said finding, order and decision is both arbitrary and capricious" (Transcript, p. 5).

It is to be noted that no reliance upon the Constitution of the United States was made in this regard.

In his motion for new trial in the Circuit Court, petitioner set forth, in paragraph 7 thereof (Transcript, 48), grounds practically identical with those found in paragraph 17 of his petition in the Circuit Court, and quoted above. Other than a repetition of the grounds alleged in paragraph 26 of the petition, above referred to, and not relied upon in the Supreme Court of Missouri, no reference to federal constitutional provisions is to be found in petitioner's motion for new trial.

In paragraph 11 of said motion for new trial, the petitioner expanded upon his allegations of paragraph 18 of his petition, wherein he alleged that the order of the Commission was made upon unlawful procedure as follows:

> "11. That the Court erred in failing to find, and in failing to reverse the order of the Commission upon the ground that the personnel of the Commission be-

tween the date of the original order and the date of the order herein reviewed has changed, that the record of the proceeding filed in this Court as the entire record does not disclose that Frank Woodward, the new Commissioner, ever read the evidence in this cause, and said Woodward did not hear the case, and the decision of the Commission was rendered without affording petitioner an opportunity to present arguments, either oral or written, to the officials who rendered the decision, including Frank Woodward; and the record, certified as being the entire record of the Commission, wholly fails to disclose that the officials who rendered the decision personally considered the whole record before deciding the case, all in violation of Section 536.080, R. S. Mo. 1949; and the decision and order of the Commission was therefore made upon unlawful procedure and in excess of the statutory authority of the Commission" (Transcript, pp. 49-50).

The Supreme Court of Missouri in its opinion stated the principal contention of the petitioner in that Court as follows (316 S. W. 2d, l. c. 4, Petition, p. 56):

"The main contention of appellant presented in the trial court and kept alive here is that the failure of the Commission to give him notice and an opportunity to be heard with respect to the order to be entered upon receipt of the mandate of the Court of Appeals deprived appellant of his property without due process of law in contravention of Amendment XIV of the Constitution of the United States and Article 1, § 10, Mo. Const. 1945."

ARGUMENT.

There is no special and important reason why this Court should review the decision of the Supreme Court of Missouri in this case. The Missouri court did not decide a federal question of substance not heretofore determined by this Court, nor did it decide the matter in a way not in accord with the applicable decisions of this Court.

The only question which would be before the Court, should it determine to review the decision of the Missouri Court, would be whether or not the Due Process Clause of the XIV Amendment to the Constitution of the United States required a further hearing before the respondent, prior to the entry of a new order, after the original order, entered upon a full and complete administrative hearing in which the respondent had fully participated, had been set aside.

The controlling principle in the determination of this question is laid down by this Court in the case of **Opp Cotton Mills, Inc. v. Administrator of the Wage and Hour Division of the Department of Labor**, 312 U. S. 126, 61 S. Ct. 524, 80 L. Ed. 624. In that case, the court stated, 312 U. S., l. c. 152:

> "The demands of due process do not require a hearing at the initial stage, or at any particular point, **or at more than one point in an administrative proceeding**, so long as the requisite hearing is held before the final order becomes effective." (Emphasis supplied.)

See also **Inland Empire District v. Millis**, 325 U. S. 697, 710, 65 S. Ct. 1316, 89 L. Ed. 1877.

Here, the petitioner was accorded a full and complete hearing before the respondent on the charges against him.

He was accorded the hearing which due process of law required, and no further or additional hearing was required under federal constitutional provisions. The decision of the Missouri Supreme Court in this regard is fully in accord with the above-cited decisions of this Court.

As for the right to present argument to Commissioner Woodward, the member of the respondent Commission who was appointed subsequent to the original hearing, as above pointed out, the basis of error in that regard upon which the petitioner relied in the state courts was that Missouri statutory provisions regarding administrative proceedings had not been complied with. No federal constitutional provision was relied upon. In order for a federal constitutional question to be considered by this Court, the question must have been raised in the state court. **Memphis Natural Gas Co. v. Beeler**, 315 U. S. 649, 62 S. Ct. 857, 86 L. Ed. 1090. Having raised but one federal question in his petition in the state court, the petitioner may not now raise the additional question upon which his principal reliance is placed in this Court. **Keokuk and Hamilton Bridge Co. v. People of State of Illinois**, 175 U. S. 626, 20 S. Ct. 205, 44 L. Ed. 299.

In view of the fact that the grounds for review most strongly relied upon by the petitioner in this Court were never presented to the courts of Missouri, that question cannot be the basis for review in this Court. The only question which was properly presented to, and considered by, the Missouri Supreme Court was correctly decided by that Court and affords no reason for the granting of the writ of certiorari in this case.

CONCLUSION.

Respondent respectfully submits that the petition for certiorari should be denied.

Respectfully submitted,

JOHN M. DALTON,
Attorney General of Missouri,
ROBERT R. WELBORN,
Assistant Attorney General of Missouri,
Supreme Court Building,
Jefferson City, Missouri,
Attorneys for Respondent.